Supreme Court, U.S.
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No. 05-74

IN THE
Supreme Court of the United States

RICARDO HINOJOSA,
PETITIONER

v.

JOSTENS INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a Rule 56 summary judgment setting involving an employment discrimination case, is it improper for an appellate or trial court to substitute its opinion for that of the ultimate fact-finder and conclude on its own that inconsistent and conflicting testimony by the movant-employer's representatives is not inconsistent and therefore not capable of establishing genuine issues of material fact when one witness stated she did not consider Hinojosa disabled , even though the witness did not know if a blind person was disabled and therefore an equally plausible conclusion could be drawn, i.e., that one or all of the employer's witnesses were not worthy of belief?

2. In an employment discrimination case, is it error to grant a Rule 56 summary judgment motion when the summary judgment evidence demonstrates equally plausible factual inferences from proven facts, being either discrimination or no discrimination, especially when the employer's affiants have demonstrated inconsistent positions regarding the stated reason for discharge and the affidavit assertions are belied by the employer's affiants depositions regarding the reason for termination , thereby at least establishing the requisite suspicion of mendacity?

3. Does the Fifth Circuit's opinion in *Hinojosa* which resolves credibility issues in favor of the movant-employer (by explaining the

inconsistencies away as unsupported by the record [there was support] or so trivial as to be immaterial), ignore this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) which: (1) clearly places credibility determinations within the province of the fact finder; (2) permits the fact finder to infer the ultimate finding of unlawful discrimination based on the *prima facie* case combined with sufficient evidence of the falsity of the stated reason for the employment action and (3) requires no additional independent evidence of discrimination?

4. Do the conflicting opinions of the Fifth Circuit regarding the plaintiff's burden in the summary judgment setting involving an employment discrimination case undermine the principle of *stare decisis* to the point it deprives litigants of the ability to accurately consider the merits of liability?

5. Whether the Trial Court and the Appellate Court in a ERISA retaliation/discrimination case can characterize direct evidence of improper motive as trivial or non-probative, particularly when it is authored by the same individuals who contend that the employee was discharged for alleged inability to perform any job, notwithstanding the direct evidence of improper motive?

6. Whether a Plaintiff who brings a ERISA retaliation case and presents direct evidence of

improper motive in the summary judgment setting is entitled to a denial of the motion for summary judgment in light of this Court's rulings in *Desert Palace* and *Reeves v. Sanderson Plumbing Products, Inc.*?

7. Whether the Fifth Circuit comports with this Court's rulings in *Reeves v. Sanderson Plumbing Products, Inc.*, *Anderson v. Liberty Lobby, Inc.*, and *Lytle v. Household Manufacturing, Inc.*, inasmuch as in this case and perhaps many others, the Fifth Circuit makes credibility determinations, weighs evidence , performs functions of the fact-finder and when weighing the evidence concludes the evidence is non-existent, trivial and non-probative without any explanation and not referencing any of the evidence offered in opposition, which in this case consisted of 102 pages of evidence?

8. In the summary judgment forum are the circuit courts, which reject the non-movant's evidence required to articulate the evidence offered and the reasons for the conclusion the non-movant's evidence is so weak it could never be probative of unlawful discrimination, in other words, should the trial court and / circuit court set out the evidence offered by the non-movant and state why the evidence is not material or so weak it could never raise a material issue of fact?

9. When an employer terminates an employee, who is working, after the execution of an affidavit which the employer's attorney represented was

needed to obtain authorization for medical care under an alleged ERISA plan, does the employee have no right of action under §510 simply because the employer claims there is no more benefit available under the plan?

10. Does an employee claiming he was regarded as being disabled by his employer, required in the summary judgment setting, to prove the employer did consider him substantially limited when it discharged him, even though the employee was working and the employer allegedly terminated the employee because he could not perform his job even though the employer initiated the termination and the employee wanted to continue working?

11. Is an individual claiming ADA disability discrimination required at the summary judgment stage to demonstrate how this physical impairment which substantially limits major life activity (as compared to those who are not impaired) affects his daily life, as well as his work life when he has produced evidence that his impairment limits his ability to lift, push, pull, and grasp objects. In other words, is it necessary to demonstrate how an impairment affects an otherwise qualified individual in his non work life when the limitation is of such a character and is so basic that it would clearly affect all aspects of an individual's life?

12. In this case, the Circuit court concluded that Jostens did not regard Hinojosa as having impairment. The conclusion was based on the

statement of a person not involved in the decision to discharge and who also stated she was unable to state if a quadriplegic was disabled. Jostens terminated Hinojosa's employment after drafting and having Hinojosa execute an Affidavit regarding his impairment. After execution of the Affidavit at Jostens lawyer's request, Hinojosa was terminated without any interactive discussion regarding reasonable workplace accommodation. When an employer regards an employer as "disabled" and does not engage in an interactive process regarding reasonable workplace accommodation, doesn't that as a matter of law establish a violation of the Americans with Disabilities Act?

13. In this case, Hinojosa offered evidence that immediately after he was discharged, Jostens noted in his personnel file that another ERISA benefit case was closed. Also, Jostens had represented to Hinojosa that if he would sign the Affidavit prepared by their lawyer, he would receive future medical care under the ERISA benefit plan. Nevertheless, the Fifth Circuit concluded that not only must Hinojosa prove that he was physically qualified for the position from which he was terminated but also that he was eligible for future EIBP (Employee Injury Benefit Plan) benefits, despite the false representation of Jostens lawyer. Was this error?

PARTIES TO THE PROCEEDING

The following is a list of all parties to the proceedings in this case in the United States

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Defendant-Appellees:
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